OPTIONAL FORM 99 (7-90)

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DISTRICT OF OREGON
PORTLAND, OREGON

BY _____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, et al.,	)	
Plaintiffs,	)	Civil No. 68-513-MA
v.	)	OPINION & ORDER
STATE OF OREGON, et al.,	)	
Defendants.	)	

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MARSH, Judge.

On August 28, 1998, the federal government and Columbia River Treaty Tribes filed a motion seeking court approval of a "Stipulated Agreement for Steelhead Harvest and Production Management of 1998 Columbia River Treaty Indian Fall Season Fisheries." This agreement would permit a fall season tribal

commercial harvest on fall chinook to re-open during the week of September 7, 1998.[1] During oral argument, the federal government confirmed that despite its name, the proposed harvest is designed to target fall chinook with incidental impacts upon listed steelhead.

On September 1, 1998, the states of Oregon, Washington and Idaho filed a memorandum opposing the stipulated agreement, attacking the manner in which the agreement was reached and asserting that no fishing season determined through the Columbia River Fish Management Plan (CRFMP) process should be allowed to proceed without a biological opinion. The states noted that the Technical Advisory Committee (TAC) to the CRFMP had issued a biological assessment for fall season fisheries (analyzing impacts on ESA listed steelhead) on June 10, 1998, but NMFS had failed to issue a biological opinion.

The crux of this dispute centers upon concerns about impacts upon listed Wild B Snake River steelhead. At several points during the parties' negotiations and during oral argument, the federal government has acknowledged that if it were to issue a biological opinion on the proposed fall fishery, it would probably have to issue a jeopardy opinion. The government has also acknowledged that to reach a no-jeopardy opinion would, in all likelihood, effectively shut down the tribal fall commercial harvest.

The Tribes come to the forum asking for federal court approval of the stipulated agreement on grounds that it meets

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[1] This motion does not involve tribal ceremonial or subsistence fishing rights.

tribal objectives within the CRFMP for a fair allocation of the tribes' share of the fall chinook while adequately addressing CRFMP conservation concerns. The Tribes argue that the states' ESA concerns are unfounded as the ESA does not apply to the Tribes' treaty interests. The Tribes accuse the states of unclean hands since state fisheries have been open and operating for several months without a biological opinion. The States acknowledge that opening their season without a biological opinion was in error and have advised the court that both Oregon and Washington fisheries have been closed, effective September 5, 1998.

The procedural posture of this dispute is somewhat awkward in that I have no complaint or motion for a restraining order. The federal government and Tribes have simply asked that I sign off on a settlement agreement to which the state parties do not agree. This stipulated agreement would allow the tribes to have an incidental harvest upon listed Group B steelhead of 15-20%. The agreement says nothing about whether these impacts would avoid jeopardy under the ESA or whether they would adequately conserve listed steelhead under some other set of standards. Paragraph 9 of the agreement provides that, "the United States agrees, on behalf of the federal agency parties to the CRFMP, upon entry of this order, that it will recognize compliance with the terms and conditions of this Stipulated Agreement and Order by any party to this litigation as full compliance with all relevant provisions of the ESA for all harvest and production measures . . ."

The federal government now argues that no biological

opinion addressing impacts upon listed steelhead issued for fall season fisheries because there was no federal agency "action" sufficient to trigger ESA compliance with §7(a)'s consultation requirement.[2] This argument is made despite the fact that the U.S. Fish and Wildlife department through the CRFMP Technical Advisory Committee (TAC) issued a biological assessment addressing impacts upon listed steelhead from fall fisheries on June 10, 1998. In addition, a 3-year biological opinion for in-river fisheries was issued for listed chinook. Further, the U.S. has specifically acknowledged that its involvement with state in-river fisheries is "inextricably intertwined, providing a basis for section 7 consultations." See also Ramsey v. Kantor, 96 F.3d 434, 442 (9th Cir. 1996) (acknowledging that states under CRFMP must comply with ESA §7 in regulating state fishing seasons to avoid §10 permit requirement).

Agency action is broadly defined under the ESA to include any action "authorized, funded, or carried out by such agency." § 1536(a)(2); Conner, 848 F.2d at 1455. Under the CRFMP, federal involvement in management of in-river fisheries relative to the tribes, other than the trust relationship, does not materially differ from federal involvement in in-river fisheries relative to the states and thus, I cannot see a valid distinction to justify non-compliance with the ESA. Based upon the government's significant involvement in in-river harvest management and

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[2] I reject the federal defendants' argument that ESA compliance should be excused because the stipulation is entered into by the Department of Justice rather than a federal agency since the stipulation was made at the initiation of the Fish and Wildlife Service and NMFS and federal counsel acts as the legal representative for those agencies.

authorization through the CRFMP and past practice, I find that there is federal agency action which triggers the need for ESA consultation to respond to the BA issued by TAC. Federal action also exists based upon federal involvement in negotiating, approving and submitting the stipulation authorizing the tribal season and setting production standards. Thus, the issue presented here is not whether the ESA applies directly to the Tribes, but whether §7 of ESA applies to the federal agencies involved in the CRFMP and harvest management. I hold that it does.[3]

The next issue is whether I should approve a stipulation that anticipates a fall tribal harvest absent the preparation of a biological opinion and absent any evidence that the proposed fishery will either avoid jeopardy or adequately conserve the species. While the Tribes argued that it should be the states' burden to show that the proposal threatens conservation, I find that as the moving parties, it is the federal government and Tribes' burden to show the absence of a conservation concern or threat of jeopardy. At oral argument, the government conceded that there was no evidence before the court that would enable me to make such a determination.

The federal government also argues that I should sign this agreement and allow the agreement to act in lieu of a

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[3] In Sierra Club v. Babbitt, 65 F.3d 1502, 1509 n.10, n.15 (9th Cir. 1995) the court drew clear distinctions between §7 which applies to federal agencies and §9 which applies to private parties. The court expressly acknowledged that §7 will have incidental impacts upon a private entity "only to the extent the activity is dependent upon federal authorization." Id., at 1511. I express no opinion as to whether §9 applies to the Tribes as that is not an issue before me.

biological opinion because I have signed two similar agreements in 1994 and 1995. As to the 1994 agreement, I note that it says nothing about replacing compliance with the ESA. As to the 1995 agreement, it also fails to specify that it supplants ESA compliance. Further, both agreements were reached through a consensus with all parties to the CRFMP, a condition which no longer exists.[4] Where one party raises an objection, that objection must be addressed and cannot be circumvented simply because the parties were able to reach an accord in the past. I note that the 1995 agreement expressly states that its terms "are not precedent and do not bind the parties with regard to any claims that can be made in the future." Based upon this language in the 1995 agreement, the states are not precluded from raising ESA concerns relative to this harvest season.[5]

The parties have not cited, nor have I been able to find any authority which would permit a stipulation or settlement agreement to take the place of a biological opinion. To the contrary, in Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989), the court held that stipulations reached between federal and private parties could not substitute for comprehensive biological opinions. See also

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[4] I further acknowledge that my execution of these prior stipulated agreements may well have been in error under the ESA, but absent a complaint or objection, I felt constrained to accept the parties' proposal.

[5] That is not to say that the states come to this dispute with clean hands. They have enjoyed the benefits of their own fishing season without a biological opinion in place and I make no finding about any other motivations that may be involved. I note only that I am unaware of any authority which would relieve one party of compliance with a federal statute based upon another party's unclean hands.

Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1227 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989). Further, the ESA expressly provides that an action agency "shall consult" with NMFS for any agency action likely to jeopardize the listed species, NMFS "shall use the best scientific and commercial data available" and NMFS "shall" issue a timely biological opinion with an incidental take statement. See also Ramsey, 96 F.3d at 442. Thus, the unambiguous language of the statute directs that NMFS must issue a biological opinion responsive to the biological assessment provided by the U.S. Fish and Wildlife Service through TAC. Once the government determined that the proposed action will likely jeopardize the listed steelhead, it was beyond prudence to then claim that the Act no longer applies.

Even assuming that the ESA did not apply to this proceeding, I would still have to find that the proposed stipulation was reasonable, consistent with the CRFMP and legally defensible before I would sign. In light of the objections raised by the state parties to the CRFMP and given the federal government's acknowledgment that the proposed tribal fishery will likely jeopardize the listed B steelhead, I cannot in good conscience sign the agreement. Throughout all of the disputes that have arisen within U.S. v. Oregon and other cases involving listed salmon, the court's primary concern has been with the long-term preservation of the listed species and my decisions have been made with that central concern in mind. While I am highly sensitive to the importance of the Tribe's treaty fishing rights, I am also mindful of the fact that no one will be fishing if the resource is depleted to the point of extinction. At least

one court has noted that, "[W]here the Secretary has acted responsibly in respect of the environment, he has implemented responsibly, and protected, the parallel concerns of the Native Alaskans. In sum, the substantive interests of the Natives and of their native environment are congruent. The protection given by the Secretary to one, as we have held, merges with the protection he owes to the other." North Slope Borough v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980).

Perhaps the process of preparing a biological opinion could have led to reasonable and prudent alternatives relative to timing or the manner of fishing that could have permitted this tribal fishery to proceed. However, by bypassing the process and taking a calculated risk towards a global settlement with court approval, we may never know.

When I decided IDFG v. NMFS, CV 93-1603 (Opinion, March 28, 1994), I found that the federal agencies failed to comply with the ESA in issuing a biological opinion because they focussed upon what the hydropower system could handle rather than upon the needs of the listed species. I see some of the same lack of focus here in that within the ESA process, the federal government appears to be more concerned with what the Tribes are willing to accept in reductions to their fall commercial harvest than they are with the needs of the listed species. A biological opinion under the ESA places the focus of analysis upon what the species needs to avoid jeopardy; whether as a policy matter that determination should fall to a later balance against Tribal treaty rights is a matter that should be taken up either by the agencies or by Congress. Federal agencies may not circumvent the

unambiguous statutory mandate of the ESA simply to avoid more difficult issues or to appease one interested party at the expense of others. Regardless of the result, the process must comply with the law and I find that the proposal submitted to me for my signature fails in that respect. Accordingly, the federal and Tribes' motion to approve their stipulation (#2154) is DENIED.

IT IS SO ORDERED.

DATED this 3 day of September, 1998.

Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge